

An Artist's Guide to Intellectual Property in a Technological Environment

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Abstract

This research delves into the tremendous gray area of intellectual property and its usage in relation to modern technology. Current laws in the United States merely outline viewing, usage, sharing, and “possession” of copyrighted content. The Constitution grants Congress the right to create appropriate copyright laws that has proven necessary with the evolution of technology and new media. The Constitution defines these powers as the right to “Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Article I, Sect. 8.) The integration of art, writing, and especially music into new formats has proven a challenge in terms of rights and “fair use” of the material. The most significant challenge facing artists and companies is that technology advances faster than the legislative process, when the purpose of copyright laws is to incentivize artists to create original work. Exclusive rights granted to the artist include the right to make or sell copies, display, perform, or create derivative works of their original subject matter. The gray area in copyright matters appears when the “Idea-Expression” dichotomy becomes necessary. The distinction between an idea and the expression of that particular idea is considered fundamental to the application of the dichotomy in law. What constitutes as “fair use” of material and criminal violation of it is what makes an understanding of copyright vital to the modern American artist.

Legal Aspects of Copyright Law

As an artist, it is impossible for you to keep tabs on every new piece of work that is released daily. It is, however, pertinent that you don't use other people's copyrighted content

without their expressed permission or allow them to use yours. Laws in the United States protect those who create original work and their ideas. The main interest of copyright has always been to incentivize creators and inventors to continue creating original material, with the knowledge that they would receive credit and recognition for their contributions. It is important to keep in mind when dealing with matters of copyright that the United States Constitution says little about it. The Constitution does, however, grant Congress the right to create appropriate copyright laws that has proven necessary with the evolution of technology and new media. The Constitution defines these powers as the right to “Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Article I, Sect. 8). That being said, it is especially important to remember that media and original works are in intangible formats that the founding fathers could have never predicted in 1775. Examples of such formats are MP3’s, digital pictures, videos, and even certain phrases. It is necessary to have an understanding of copyright laws regarding recent technology to ensure proper usage. At the core of this constantly evolving technological legislation is the Constitutional idea that writers and authors should have exclusive rights to their own material, no matter what the material might be.

A positive aspect to a slow-moving legislative process is that lobbyists are constantly rallying for their cause. Because legislation on copyright only gets amended every 10 years or so, it is necessary that lobbyists bring attention to their rights over their work in new forms of media. Bill and Ellen Seiter of the Yale University Press describe the invisible struggle of the artist and the user as this:

You can think of copyright law as an arms race between content creators and content users, and the rise of the Internet as tantamount to the advent of the atomic bomb. The Web and digital media have radically transformed the way we produce and consume content, and indeed transformed the very nature of what you and your audience consider art. Where this arms race gets tricky for you, as a media artist of the twenty-first century, is that you are sure to fight on both sides of the copyright battlefield, sometimes as creator of your own content, sometimes as user of other people's content.

In other words, an extensive knowledge of the boundaries of copyright law can only stand to benefit you and your work. With that being said, there are only certain formats your work can be in order for it to be eligible for copyright. In his book "How to Obtain a Copyright", Mark Warda gives a detailed explanation of the variety of formats that can be copyrighted:

Literary works- books, poems, computer programs, speeches, and the like.

Musical works- including "musical notation and the accompanying words"(Warda, 2004).

Dramatic works- "plays, operas, scripts, screenplays, and any accompanying music" (Warda, 2004).

Pictorial, Graphic, and Sculptural works- images and sculptures (including globes and glasswork), wallpapers, and architectural/engineering sketches

Sound Recordings- music, audio clips, live recordings, sound effects, etc.

Motion Pictures and Audiovisual works- "movies, videos, and film strips" (Warda, 2004).

Compilations- existing works put together by a third party may be copyrighted.

Architectural works- it is now legal to copyright a building, not just the sketches for it

So long as your work falls into one or more of the above categories, it is lawful for you to obtain a copyright whether you choose to register it or not.

As an artist, your work is your brand. If anyone can take credit for your brand, why should anyone pay you for it? It all comes down to the legality of your rights over your own material and how you choose to exercise them. Registering a copyright on a work you have spent significant effort, time, or money on is simply a smart investment. Although you still withhold the rights over your material even if you choose not to register it, it would be wise to register your work in the event of a lawsuit. Filing for a copyright is relatively simple, although tedious. For the purpose of this research, I will not go into depth over how to register a copyright, but will simply acknowledge that the option is available to you (although not required). The full application process can be found on the website of the copyright office's website.

So what rights over your work do you have, as an original Author or Inventor? What rights do you have as a borrower of ideas? Terms like public domain, trademark, limited rights, and fair use will become inherently useful in search of this answer.

One of the fundamental (although loosely structured) components of copyright is the "Idea-Expression" dichotomy. simply means that the original creator has the exclusive rights over their ideas, but does not have exclusive rights over the expression of those very same ideas. This concept is easy to understand, but difficult to apply in real-life. In a research paper for Peking University, Li Yu-Feng writes that "Idea-expression is vague, elastic and metaphorical, it is not a perfect doctrine which could be used predictably to decide whether to put a particular work into the public domain or not, but only an ex-post facto characterization" (Yu-Feng, 2007).

Idea-Expression is not a concrete legal doctrine, but it is, however, helpful in determining if usage of content is within reasonable expression.

The basic rights that anyone has over their own original, non-derivative (emphasis on non-derivative) are spelled out in the Copyright Act of 1976. The first is that the owner of the material has the right to display their work in a public setting. The second is that the owner also has the right to reproduce and distribute copies of their work at their own discretion. This means that although the work can be distributed and displayed in a public area, the work does not become public domain. A third right granted to the creator is the right to perform or create other derivative works based off of the original piece. An example of a derivative work would be a parody or any type of material that directly references the original. This right only applies if the creator of the derivative piece also owns the original material (U.S. Copyright Act of 1976). These rights, however, come with limitations.

As an artist with concerns about ensuring you receive full credit for your work, it is essential for you to have an understanding of not only your rights, but the rights of others who may view, use, or copy it. A basic explanation of the definition of artist's rights would be that as long as your work is in tangible form, it is protected even if not displayed or posted. These rights are written out in the Fair Use statute and excuse certain usage of your material, with or without your consent. Daniel Tysver describes the importance of the Fair Use statute as the "Belief that not all copying should be banned, particularly in socially important endeavors such as criticism, news reporting, teaching, and research". There are four components that determine whether or not an action is in Fair Use:

- 1) The purpose of use is for non-profit educational use rather than commercial.

- 2) The nature of the work in question (viewing the work as a whole)
- 3) The juxtaposition of the amount and content used versus the copyrighted material in violation as a complete work.
- 4) The effect the use of the material on the market/market value for the copyrighted work. (Tysver, 2015).

How do these four factors relate to you? If you are a writer, does this mean that anyone can take excerpts from your book or script and claim them? As a musician, does this mean that anyone can play your original songs in the certain settings without your permission?. Indeed, the Fair Use clauses bring more questions than they do answers. Since this research focuses primarily on internet and technology in relation to copyright, the focus now will shift to interpretation of these laws into a digital setting.

Digital Platforms

The internet has become a vital part of the art scene and the most common way for musicians to get their music out there. The internet allows its users to post images of their work, recordings, and even sell them in digital formats. Platforms like iTunes allow its users to purchase music and videos for a price determined by the artist, while granting the consumer a digital copy. This does not mean that the consumer is granted the exclusive rights to that content, as it is still the right of the artist to distribute their work. Sites like YouTube and MP3 Converters make this seemingly cut-and-dry process more difficult, because users can upload and share anything (videos, music videos, performances, illegally recorded music) whether they have the rights to it or not. MP3 converters allow users to take audio from such YouTube videos and download the audio for free, without the artist's explicit consent. This takes a huge toll on the

recording artist, as they lose control over who is distributing copies of their work. Not to mention, they lose colossal amounts of money when people download their work instead of purchasing it. Occasionally, an artist may choose to include a free download link for their music on their website, in which case, the download is legal and within fair use. A common misconception when dealing with the internet is that anything posted there automatically becomes public domain . Meaning any pictures, essays, logos, or songs posted to the internet are immediately up for public use. This is a huge myth! Regardless of where or when the content has been posted, it is not public domain (Grossman, 2009). It is hugely important to be wary of what content is legally available for download, and what is not.

Another potentially dangerous aspect of downloading or sharing audio from an outside source (without the artist's permission) is that anyone who chooses to include the audio in their own work is subject to persecution over copyright infringement. Bill and Ellen Seiter of the Yale University Press advise that if you intend to create a derivative work, you will need proper documentation of how you obtained the right to use it, or evidence that your work constitutes fair use (Seiter, 2012).

When it comes to images, technology casts a pall over exclusive rights. For example, as an artist, you might want to post a picture of your art onto Facebook, Twitter, Instagram, or any other social media. However, anyone can happen upon your image and save it, and then turn around and post it as their own. A not-so-secret trick that should help you to maintain credit for your image is to add a watermark or assert your rights to your work before posting. A watermark is usually a faint name of the creator of the image and usually includes the date of creation or copyright in it. Examples of a watermarked image and a non-watermarked image are below:



non-watermarked image (copyright 2015- M. Mathis, 2015)



watermarked image (copyright 2015- M. Mathis).

As you can see, the differences in the two images are slight and although they may be hard to notice at first, they distinguish your work as yours in the event of a dispute. In this case, the watermark is located on the left-hand side of the image to the right. A watermark is useful in ensuring that anyone who tries to save your image and re-post it will still have your credit included. It also discourages people from trying to take credit for your art, because your name is embedded into the image, declaring it as your intellectual property. If you are unable or unwilling to place a watermark on your work, all images or tangible forms should have on them “copyright {insert year of creation}- First Initial and Last Name of Artist”. I have included an example of this below the images of my own work above. This asserts that in any instance where someone claims your work, you can prove that you posted your name and rights within reasonable expectation of ownership.

The internet does have some positive aspects for digital artists, however. The date in which something was posted is included somewhere in any post you make, which will become useful if someone sues you for basing your work off of theirs; when you can prove that yours was posted first.

Work-For-Hire Agreements

As an artist, whether you deal in scripts, paintings, music, or any other medium, the prospect of working-for-hire will most likely come up. Working for hire is when a person or company hires you to create an original piece for them or their company for their use. Before you accept or reject a work-for-hire agreement, more than likely a contract will need to be drawn. Typically a work-for-hire contract stipulates that upon completion of the work, the artist loses the rights to it as soon as it leaves their hands and becomes the sole property of whoever bought the work. This means that the employer or contractor withholds all of the rights to the work and the artist retains none. As with most legal contracts, this can be negotiated. The buyer and yourself may be joint owners of the work (meaning you collaborated on it together), or you may want to keep all of your exclusive rights and simply sell them a copy of your work. Knowing your options will make you more competitive in the negotiating process. Bill and Ellen Seiter explain in great detail the importance of understanding work-for-hire agreements:

A work-for-hire agreement typically will make the creator represent and warrant that the work commissioned is an original work of authorship of which he or she is the sole creator; that no other person co-authored it, worked on it, or has any right, title, or interest in it, other than people the producer specifically knows about; and that the creator hasn't granted anybody else any rights in the work (Seiter, 2012).

Whatever the case, ensure that your interests and any potential pitfalls are covered in the negotiation so that if a lawsuit erupts, you have documentation that your creative work was your sole property and does not violate fair use.

In Conclusion

In a world of constantly evolving technology and a legislation left to play catch-up, it is pertinent for creative talent to not only keep tabs on their copyrighted material and their rights to it, but their use of other's material as well. The laws appear to be strict and heavily structured at first glance. The main difference between what is allowed by law and what is not in terms of artistic material is the doctrine of Idea-Expression. The laws describe that the idea is the copyrighted work, but the expression of that particular idea is not. The laws are loosely correlated with how to decipher such ideas and their expressions, leaving much to be determined by the fair use clauses. What isn't included in the fair use clauses, however, is how they apply to digital platforms where anyone can post any image, audio, video clip, or text. Applying even basic knowledge of copyright laws can save you from infringing on others' work, and being able to recognize when your material is being infringed upon as well.

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